Office-Supreme Court, U.S.
FILED
FEB 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-5856

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of the State of Georgia

REPLY BRIEF FOR PETITIONER

WILLIAM H. ALLEN
JOHN J. DONOHUE

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

Attorneys for Petitioner

February 1981

TABLE OF AUTHORITIES

Cases:	Page
Furman v. Georgia, 408 U.S. 238 (1972)	6
Godfrey v. Georgia, 100 S. Ct. 1759 (1980)	1, 2, 3
Gregg v. Georgia, 428 U.S. 153 (1976)	2
Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980)	4
Holton v. State, 243 Ga. 312, 253 S.E.2d 736, cert. denied, 444 U.S. 925 (1979)	3
Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980)	6, 7
Stromberg v. California, 283 U.S. 359 (1931)	6
Statutes:	
Ga. Code Ann. § 27-2534.1(b)(7)	2, 3, 4
Rule:	
Rules of the United States Supreme Court, Rule 17	7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5856

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of the State of Georgia

REPLY BRIEF FOR PETITIONER

I.

This Court reaffirmed in Godfrey v. Georgia, 100 S. Ct. 1759, 1764 (1980), that if a state means to authorize capital punishment it has a constitutional responsibility "to define the crimes for which death may be the sentence in a way that obviates standardless [sentencing] discretion," and, if the jury is the sentencing authority, to provide it with clear and objective standards to channel the exercise of its discretion. The Court held that Georgia had failed in this constitutional obligation in allowing a jury to sentence a man to death on the basis of only the broad

and vague terms of its statutory catchall aggravating circumstance, Ga. Code Ann. § 27-2534.1(b)(7). The Court said that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." Id. at 1765. The message of Godfrey is clear: the bare words of the catchall aggravating circumstance do not satisfy the constitutional obligation to channel the jury's discretion and therefore, if the jury has been charged only in the bare words of the statute, a resulting death sentence is unconstitutional.

When Godfrey is applied to this case petitioner's death sentence must be set aside. The defect in the process by which the death penalty was imposed on Godfrey -- and on petitioner -- is not, however, a mere error in jury instructions, as the State attempts to characterize our argument here.[1/] (Br. in Opp. 9-12.) The defect is the use of vague statutory words, undefined and unexplained for the benefit of the sentencer, as the sentencer's only means of distinguishing the crime that may merit capital punishment from

---

1/ There is no merit to the State's argument that the petitioner has not previously objected to the State's failure to apprise the jury of any narrowing construction of the catchall aggravating circumstance. Quite apart from the fact that the necessity of a narrowing jury instruction is part of the broader issue of the breadth of the catchall aggravating circumstance, the jury instruction issue was squarely posed when this Court directed the Georgia Supreme Court to reconsider its judgment in the light of Godfrey. In his memorandum requesting the opportunity to argue to the Georgia court concerning the meaning of Godfrey, petitioner specifically addressed the jury instruction question (see Pet. App. 13a-14a), and if the Georgia Supreme Court had not denied petitioner an opportunity to be heard, the issue could have been fully briefed.

the crime that does not. It is conceivable that, carefully explained and defined, even the words of the Georgia catchall aggravating circumstance could be rescued from their vagueness. The prospect of such a rescue moved this Court in Gregg v. Georgia, 428 U.S. 153, 201 (1976), to decline to rule the Georgia catchall aggravating circumstance unconstitutional on its face. There was not even an attempt at a rescue here, any more than in Godfrey's case. That is the importance of the jury instructions: the absence of meaningful jury instructions deprives the State of one possible basis for sustaining the death penalty.[2/]

The State, however, says that this case is different from Godfrey in that there the jury found only the first clause of the catchall aggravating circumstance -- "outrageously or wantonly vile, horrible and inhuman" -- whereas here the jury tacked on the qualifying phrase "in that it involved torture to the victim or depravity of mind on the part of the defendant." (Br. in Opp. 6.) That is not a distinction that makes the death penalty constitutional in this case when it was unconstitutional in Godfrey. The Georgia Supreme Court itself has recognized that the "depravity of mind" phrase by itself would "allow the death penalty to be imposed at random in any murder case." Holton v. State, 243 Ga. 312, 253 S.E.2d 736, 740, cert. denied, 444 U.S. 925 (1979). And, as petitioner has pointed out, because "torture" and "depravity

---

2/ The State argues that "there is no statutory provision under Georgia law which requires that the specific terminology under § (b)(7) be explained." (Br. in Opp. 12.) Perhaps not. But the Eighth Amendment to the United States Constitution does require that statutory aggravating circumstances be reasonably clear and objective on their face or be defined to jurors in clear and objective terms. Godfrey, 100 S. Ct. at 1764-65.

of mind" are phrased in the disjunctive in the statute and were so phrased in the jury's finding, the jury logically need have found no more than "depravity of mind" and the other elements held insufficient in Godfrey.[3/]

The jury was not told a word about what "depravity of mind" must entail. Moreover, on the facts -- no substantial evidence of torture and no finding of an aggravated battery -- there was no such "depravity of mind" as this Court understands is contemplated by Georgia law. In the Godfrey plurality opinion the Justices said that one of three "separate but consistent conclusions respecting the § (b)(7) aggravating circumstance" that could be discerned from the Georgia cases was that "the phrase, 'depravity of mind,' comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim." 100 S. Ct. at 1766. Now, that view of depravity may have been broadened in Hance v. State, 245 Ga. 856, 862, 268 S.E.2d 339, 346 (1980), and in the remand opinion in this case (Pet. App. 8a). The application to petitioner of a broader view of what constitutes depravity than prevailed at the time of his trial raises a serious question. (Pet. 24-25.) Moreover, neither view was brought home to the jury that sentenced petitioner -- or even suggested to it. Appellate definitions by themselves cannot assist in channeling jury discretion See 100 S. Ct. at 1769 (Marshall, J., concurring).

3/ This is apart from the fact that there was little or no evidence of torture as that term is commonly understood. As urged in the petition, a single isolated comment in the confused and inaccurate "statement" of petitioner, which is what the State relies on to support its theory of torture (Br. in Opp. 6), cannot constitutionally overcome the evidence of the State's own witnesses that the victim was unconscious after the initial blow and therefore could not have been tortured.

The State urges here that the Georgia Supreme Court's wooden attempt to find technical factual distinctions between this case and Godfrey somehow satisfies its constitutional responsibility to keep the catchall aggravating circumstance within constitutional bounds. But Godfrey tells us that relevant mitigating circumstances must be considered in determining whether a finding of "depravity of mind" is constitutionally permissible. Although the State argues that some of the factors that persuaded this Court that Godfrey's death sentence could not constitutionally be based on section (b)(7) of the Georgia statute are not present here, the State does not advert at all to the factors that make this an a fortiori case as compared with Godfrey. For example, petitioner was a teenager at the time of the murder and Godfrey was significantly older. Petitioner was severely intoxicated at the time of the murder and Godfrey was not. Petitioner killed only one person but Godfrey killed two. Petitioner's victim never anticipated the prospect of death, but one of Godfrey's victims clearly did. The State has ignored the facts that militate against the death penalty, and it has failed therefore to honor its solemn constitutional duty to avoid the arbitrary and capricious infliction of the death penalty.

II.

Petitioner asserts that the unconstitutionality of either of the two aggravating circumstances in this case requires the reversal of the death sentence. Thus, the death penalty is not saved by the fact that the jury also found that the murder of which petitioner was convicted was committed while petitioner was engaged in armed robbery,

which may be a valid aggravating circumstance (but see Pet. 13 n.6, 16-17). The State argues that it is well settled in Georgia that, as long as the Georgia Supreme Court sustains a finding of one aggravating circumstance, then the death sentence is permissible. (Br. in Opp. 14.) It is significant that the State does not assert straightout that the Georgia Supreme Court, whose opinion on remand was devoted to justifying petitioner's death sentence on the basis of the catchall aggravating circumstance, affirmed petitioner's death sentence by reference to this "clear" rule of Georgia law. As pointed out in the petition, the opinion is at best ambiguous, and petitioner, facing death, is entitled at the very least to a remand to resolve the ambiguity. (Pet. 16-17 & n.8). More fundamentally, a rule of Georgia law, however clear, cannot prevail over the United States Constitution.

The Court of Appeals for the Fifth Circuit has lately ruled that the death penalty cannot be constitutionally imposed if one of three (not just two) aggravating circumstances found by a Georgia jury is later held unconstitutional. The case is Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), a habeas corpus case. The court stated the question as follows:

> "The question presented, then, is whether the death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty." Id. at 406.

In stating its affirmative answer, the court first cited Stromberg v. California, 283 U.S. 359, 367 (1931), for the proposition that "if the jury has been instructed to

consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside." 631 F.2d at 406. It went on to say that "[t]his settled principle of law applies with particular force in cases in which the death penalty has been imposed," citing Furman v. Georgia, 408 U.S. 238 (1972), which the court said had held "that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner." 631 F.2d at 406. The court concluded:

> "It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground." Id.

We recognize that Justices of this Court have expressed differing views on the applicability of the common sense rule of Stromberg to sentencing decisions, as opposed to convictions. (See Pet. 17-18.) This case is an appropriate vehicle for resolving those differences. Indeed, under the new Rule 17.1(b), a grant of the writ is called for by the conflict between the position the Georgia Supreme Court has taken on the significance of the invalidity of one of two or more grounds for imposing the death penalty and the squarely

contrary position of the Court of Appeals in Stephens v. Zant. "[A] state court of last resort has decided a federal question in a way in conflict with the decision . . . of a federal court of appeals."

CONCLUSION

For the reasons stated in the petition and in this reply, a writ of certiorari should be granted to review the judgment of the Georgia Supreme Court.

Respectfully submitted,

WILLIAM H. ALLEN
JOHN J. DONOHUE

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

February 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-5856

DANIEL JOSEPH BAKER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

CERTIFICATE OF SERVICE

I, William H. Allen, a member of the Bar of this Court and one of the attorneys for the petitioner in this case, hereby certify that I have this 2nd day of February, 1981, served the accompanying reply brief for petitioner on the respondent State of Georgia by causing copies thereof to be mailed, properly addressed and with first-class postage prepaid, to Nicholas G. Dumich, Esq., Assistant Attorney General of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334.

William H. Allen